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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

KRISTEN HALL, *on behalf of herself*
and all others similarly situated

Plaintiff,
vs.

SMOSH DOT COM, INC. d/b/a SMOSH,
and MYTHICAL ENTERTAINMENT,
LLC,

Defendants.

) Case No.: 2:21-cv-01997-JAM-AC

)

) **DEFENDANTS' MOTION TO**
) **DISMISS PURSUANT TO**
) **FEDERAL RULE OF CIVIL**
) **PROCEDURE 12(b)(6)**

) Date: June 28, 2022

) Time: 1:30 p.m.

) Courtroom: 6

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1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on June 28, 2022, at 1:30 p.m., or as soon
3 thereafter as may be heard by the above-entitled court, located in Courtroom 6 at
4 Robert T. Matsui United States Courthouse, 501 I Street, Sacramento, California
5 95814, defendants Smosh Dot Com, Inc. and Mythical Entertainment, Inc.
6 (collectively, “Defendants”) will and hereby do move this Court for an order
7 pursuant to Federal Rule of Civil Procedure 12(b)(6) dismissing the First Amended
8 Complaint (“FAC”) filed by Plaintiff Kristen Hall.

9 The Motion is based upon the grounds that the FAC fails to state facts
10 sufficient to constitute any claim against the Defendants.

11 The Motion is based on this Notice of Motion and Motion; the attached
12 Memorandum of Point and Authorities; the Declaration of Jordan Susman, and the
13 [Proposed] Order filed concurrently herewith; other matters for which the Court
14 may take judicial notice; the pleadings, papers, and records on file herein; and upon
15 such oral and/or documentary evidence as may presented to the Court at the time of
16 the hearing of this Motion.

17 PLEASE TAKE FURTHER NOTICE THAT, pursuant to Local Rule and
18 230(c), any opposition to this Motion shall be in writing and filed and served not
19 less than fourteen (14) days preceding the noticed hearing date. No party will be
20 entitled to be heard in opposition to a motion at oral arguments if opposition to the
21 motion has not been timely filed by that party. See L.R. 135. A failure to file a
22 timely opposition may also be construed by the Court as a non-opposition to the
23 Motion.

24 Pursuant to the Court's Order re Filing Requirements (Dkt. 5-2), on April 5,
25 2022, counsel for the parties thoroughly discussed the substance of this Motion
26 and were unable to reach any resolution. Susman Decl. ¶ 11.

1 WHEREFORE, Defendants hereby request that the Court enter an order:

2 A. Dismissing the FAC; and

3 B. Awarding any and all such other relief as this Court deems proper.

4
5 Dated: April 14, 2022

NOLAN HEIMANN LLP

6
7 By: 

Jordan Susman

8 Attorneys for Defendants
9 Smosh Dot Com, Inc. d/b/a Smosh,
and Mythical Entertainment, LLC

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants Smosh Dot
3 Com, Inc. d/b/a Smosh, and Mythical Entertainment, LLC (collectively
4 “Defendants”) respectfully request that Plaintiff Kristen Hall’s First Amended
5 Complaint (“FAC”) be dismissed with prejudice.

6 **I. INTRODUCTION**

7 Plaintiff’s son provided his phone number to Defendants in order to receive
8 promotional text messages from them. Consequently, Plaintiff’s son later received
9 promotional messages and never opted out of receiving such messages.

10 Plaintiff then turned around and filed this class action claiming that
11 Defendants’ compliance with her son’s request to receive promotional messages
12 somehow violates the TCPA and Texas law. Notwithstanding that Plaintiff does not
13 have standing to bring this action, her claims are baseless, and this lawsuit is
14 frivolous at best.

15 Even though Defense counsel provided Plaintiff’s counsel with case law
16 showing that a minor may enter into a contract, Plaintiff and her counsel refuse to
17 dismiss this action. Accordingly, Defendants requests that the Court dismiss the
18 entire action prejudice.

19 **II. STATEMENT OF FACTS**

20 Like many parents, Plaintiff Kristin Hall (“Plaintiff”) gave her teenage son a
21 cell phone. Like many teenagers, Plaintiff’s son used his cell phone for his own
22 personal activities, including providing his cell phone number (the “Number”), to
23 Defendants, who own the retail website <https://smosh.com>, so he could receive
24 inventory updates and promotional text messages. FAC ¶ 6 and FAC Ex. B.

25 As a result of Plaintiff’s son *opting in* to receive messages from Defendants,
26 between December 25, 2019, and June 29, 2020, the Number purportedly received
27 five text messages announcing sales or new merchandise at <https://smosh.com>. FAC

¶ 34, Ex. A.

Plaintiff's son never opted out of receiving messages from Defendants, which he could have easily done by responding with "STOP."

Even after Plaintiff found out about her son's cell phone activities, she did not respond to Defendants' messages with "STOP," which would have removed the Number from the Defendants' text message list as specifically set forth and easily discoverable in the Defendants' Terms and Conditions that were accepted by opting in to the service. Instead, Plaintiff hired a law firm that brags it can turn unwanted communications into "significant monetary compensation" and sought to turn the five text messages that were *solicited by her son* into a "significant monetary compensation." Susman Decl. ¶ 10, Ex. D.

On August 6, 2021, more than one year after the Number purportedly received the last text message, Plaintiff sent Defendants a demand letter, claiming that Defendants had violated the Telephone Consumer Protection Act (the "TCPA") 47 U.S.C. 227, and demanding payment by Defendants. Susman Decl. ¶ 2 Ex. A.

On September 1, 2021, Defendants responded to Plaintiff's demand letter. *Id.* ¶¶ 3, 8, Ex. B, p. 6. Defendants informed Plaintiff that Defendants only send text messages to consumers who expressly "opt-in" to receive such advertising and stated Defendants' willingness to block any future communications. *Id.*

On September 2, 2021, Plaintiff responded to Defendants and acknowledged that "consent is a defense" to TCPA claims. *Id.* ¶¶ 4, 8, Ex. B, p. 5.

On September 9, 2021, Defendants informed Plaintiff that Defendants have no record of Plaintiff in their records. *Id.* ¶¶ 5, 8 Ex. B, p. 4.

Only then did Plaintiff finally provide Defendants with the Number. *Id.*

Upon receiving the Number, on September 9, 2021, Defendants immediately

1 informed Plaintiff that E*** Howsley had signed up to receive text messages on
2 November 3, 2019, and produced written evidence of same. FAC, Ex. B; Susman
3 Decl. ¶¶ 6, 8 Ex. B, p.3.

4 Upon receipt of this information, Plaintiff was forced to admit that E***
5 Howsley was, in fact, Plaintiff's son and the primary user of the Number. *Id.* ¶¶ 7, 8
6 Ex. B, p. 2.

7 Notwithstanding Defendants' indisputable evidence that Plaintiff's son had
8 opted-in to receive promotional text message communications, and notwithstanding
9 Plaintiff's admission that "consent is a defense," Plaintiff filed the instant lawsuit.

10 In the FAC, Plaintiff sought to downplay that Plaintiff's son was the user of
11 the Number and that Plaintiff's son signed up to receive text messages. However, no
12 amount of ribbon and glue can hold together Plaintiff's claims. The specifically
13 pleaded allegations in the FAC, coupled with the communications between
14 Plaintiff's counsel and Defendants, some of which are attached to the FAC, do not
15 state valid claims for relief.

16 The FAC's single claim for violation of the TCPA¹ fails as a matter of law for
17 several independent reasons:

- 18 - Plaintiff does not have standing to bring this lawsuit because it was her
19 son, and not Plaintiff, who purportedly received the text messages;
- 20 - The actual user of the Number, Plaintiff's son, provided Defendants
21 with express consent to send the Number promotional text messages;

22 The FAC similarly fails to state a viable claim for violation of Texas Business
23 and Commerce Code ("TBCC") section 302.101 *et seq.* because: (1) Defendants
24

25 ¹ On April 11, 2022, the Court dismissed Count I of the FAC, which was asserted
26 under 47 U.S.C. § 227(b). [Dkt. 33].

1 purportedly sent text messages, not “telephone calls” as required by statute (TBCC
2 §§ 301.001(4) and 302.001(7)); (2) Defendants sent text messages in response to the
3 express request of Plaintiff’s son to receive messages (TBCC § 301.051), and; (3)
4 Defendants fall within an exception to the statute, as they have operated for more
5 than two years a retail establishment where consumer goods are displayed and
6 offered for sale continuously (TBCC § 302.059).

7 In sum, the FAC is not merely frivolous, but without any factual basis and
8 should be dismissed with prejudice.

9 **III. PLAINTIFF LACKS ARTICLE III STANDING**

10 Before addressing the merits of Plaintiff’s claims, the Court must first
11 determine if Plaintiff has standing. Article III standing requires that a plaintiff “have
12 (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of
13 the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”
14 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). It is readily apparent from the
15 face of the FAC that Plaintiff lacks standing.

16 “The TCPA establishes the substantive right to be free from certain types of
17 phone calls and texts absent consumer consent.” *Van Patten v. Vertical Fitness Grp.,*
18 *LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (citing *Spokeo, Inc. v. Robins*, 578 U.S.
19 330, 338 (2016)). “Unsolicited telemarketing phone calls or text messages, by their
20 nature, invade the privacy and disturb the solitude of *their recipients*.” *Id.* (emphasis
21 added). Courts have repeatedly held that the “called party” language of the TCPA
22 means the actual recipient of the call (or in this case, the text messages) and not the
23 owner or intended recipient. *See Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp.
24 2d 1316, 1321 (S.D. Fla. 2012), *aff’d*, 755 F.3d 1265 (11th Cir. 2014) (collecting
25 cases).

1 Although Plaintiff claims in the FAC that she is the “owner” of the Number
2 and as the “owner” she allegedly found the text messages “irritating, exploitative
3 and invasive,” **Plaintiff fails to plead that she ever used the Number or received**
4 **any of the alleged messages from Defendants.** FAC, ¶ 37. In fact, the FAC admits
5 that Plaintiff’s son was the “user” of the Number. FAC, ¶ 26. It is the actual user of
6 the number that the TCPA is intended to protect. *See Agne v. Papa John's Int'l,*
7 *Inc.*, 286 F.R.D. 559, 565 (W.D. Wash. 2012).

8 Plaintiff’s desperate efforts to downplay her son’s use of the Number are
9 contradicted by Plaintiff’s earlier admission that Plaintiff gave her son the cell
10 phone for the purpose of maintaining contact with her and her son’s father. Susman
11 Decl. ¶ 3 Ex. B, p.2 (“She gave him a cell phone for E*** to stay in contact with her
12 and his father only.”). Consequently, Plaintiff’s claims fail as a matter of law, as she
13 is not a proper plaintiff to this action.

14 **IV. LEGAL STANDARD APPLICABLE TO RULE 12(B)(6) MOTION**

15 A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6)
16 where the pleadings fail to state a claim upon which relief can be granted. While the
17 Court’s “inquiry is limited to the allegations in the complaint, which are accepted as
18 true and construed in the light most favorable to the plaintiff,” (*Lazy Y Ranch LTD*
19 *v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008)), it may also utilize documents
20 submitted as part of the complaint and documents whose contents are alleged in the
21 complaint. *See Informix Software, Inc. v. Oracle Corp.*, 927 F. Supp. 1283, 1285
22 (N.D. Cal. 1996) (“[D]ocuments whose contents are alleged in a complaint, and
23 whose authenticity no party questions, but which are not physically attached to the
24 pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.”).

25 The FAC referenced cherry-picked pre-litigation communications between
26

1 Plaintiff's and Defendants' counsel. Accordingly, all of the written pre-litigation
2 communications between Plaintiff's and Defendant's counsel may be considered in
3 deciding this motion. *See Fowlkes v. Rodriguez*, 584 F. Supp. 2d 561 (E.D.N.Y.
4 2008) ("The court may also consider documents or information in defendant's
5 motion papers if plaintiff has knowledge or possession of the material and relied on
6 it in framing the complaint."); *Hapin v. Arrow Financial Services*, 428 F. Supp. 2d
7 1057 (N.D. Cal. 2006) (internal quotes and citations omitted) ("district court may
8 consider the full texts of documents that the complaint only quotes in part. This rule
9 precludes plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting
10 references to documents upon which their claims are based.").

11 While the pleading standard of Federal Rule of Civil Procedure 8(a)(2) is
12 liberal, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to
13 relief' requires more than labels and conclusions, and a formulaic recitation of the
14 elements of a cause of action will not do." *Bell At. Corp. v. Twombly*, 550 U.S. 544,
15 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

16 Per *Twombly*, a plaintiff must not merely allege conduct that is conceivable
17 but must instead allege "enough facts to state a claim to relief that is plausible on its
18 face." *Id.* at 570. "A claim has facial plausibility when the plaintiff pleads factual
19 content that allows the court to draw the reasonable inference that the defendant is
20 liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
21 (citing *Twombly*, 550 U.S. at 556).

22 The FAC has not, and cannot, meet these burdens.

23 //

24 //

25 //

1 **V. THE FAC DOES NOT STATE A CLAIM FOR VIOLATION OF THE**
2 **TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. § 227(c)(5)**

3 Section 227(c)(5) of the TCPA allows a private right of action for “a person
4 who has received more than one telephone call within any 12-month period by or on
5 behalf of the same entity” in violation of the prescribed regulations. 47 U.S.C. §
6 227(c)(5). Section 227(c) is titled “Protection of subscriber privacy rights” but
7 specifically addresses the position of “residential telephone subscribers’ privacy
8 rights to avoid receiving telephone solicitations to which they object.” *Id.* §
9 227(c)(5).

10 Plaintiff’s TCPA 47 U.S.C. § 227(c)(5) claim fails for two reasons: (i)
11 Defendants received express consent to contact the Number and (ii) the Number was
12 connected to a cell phone.

13 **A. Defendants Received Express Consent From the Number’s User to**
14 **Send the Text Messages**

15 The TCPA only prohibits unwanted communications. *Van Patten*, 847 F.3d at
16 1047 (“the TCPA is a remedial statute intended to protect consumers from unwanted
17 automated telephone calls and messages”). Text messages sent to a consenting
18 consumer cannot give rise to TCPA claims. 47 U.S.C. § 227(b)(1)(A)(iii).

19 As discussed above, the FAC admits that Defendants obtained the Number on
20 November 3, 2019, when Plaintiff’s teenage son agreed to receive messages. FAC ¶
21 41, Ex. B.

22 Despite being under the age of majority, Plaintiff’s teenage son was capable
23 of consenting to receive text messages from Defendants. The law in Texas, where
24 Plaintiff and her son reside, is clear: minors may enter into contracts without
25 parental consent and such contracts can be invalidated based on the minor’s age

1 only at the minor's election. *Mr. W Fireworks, Inc. v. Ozuna*, No. 04-08-00820-CV,
2 2009 WL 3464856, at *6 (Tex. App. Oct. 28, 2009) (“**when a minor enters into a**
3 **contract, that contract is not void**, but is voidable at the election of the minor”);
4 *Dairyland Cty. Mut. Ins. Co. of Texas v. Roman*, 498 S.W.2d 154, 158 (Tex. 1973)
5 (“While the contract of a minor is not void, it is voidable at the election of the
6 minor. This means that the minor may set aside the entire contract at his option, but
7 he is not entitled to enforce portions that are favorable to him and at the same time
8 disaffirm other provisions that he finds burdensome.”); *In re B.W.*, 313 S.W.3d 818,
9 823 (Tex. 2010) (“[A] minor’s contracts are voidable at the minor’s election, even if
10 the minor knew what he or she was doing and innocent people are prejudiced.”).

11 **California law, which Plaintiff claims in the Rule 26(f) Report should**
12 **apply to this case, also “plainly provides that a minor has the capacity to**
13 **contract.”** *Lopez v. Kmart Corp.*, No. 15-CV-01089-JSC, 2015 WL 2062606, at *4
14 (N.D. Cal. May 4, 2015) (citing Cal. Civ. Code § 1557 and Cal. Family Code §
15 6700); *C.M.D. v. Facebook, Inc.*, No. C 12-1216 RS, 2014 WL 1266291, at *3
16 (N.D. Cal. Mar. 26, 2014), *aff’d sub nom. C.M.D. ex rel. De Young v. Facebook,*
17 *Inc.*, 621 F. App’x 488 (9th Cir. 2015) (“the basic presumption is that minors *do*
18 have the power to enter into binding contracts.”) (emphasis in original).

19 For instance, a minor can legally sign a liability waiver with their equestrian
20 coach and the waiver can only be voided at the minor’s request. *Eriksson v.*
21 *Nunnink*, 233 Cal. App. 4th 708, 724 (2015). A minor can enter a contract to
22 purchase game credits and cannot later, after spending the credits, try to disaffirm
23 the contract and get their money back. *I.B. ex rel. Fife v. Facebook, Inc.*, 905 F.
24 Supp. 2d 989, 1004 (N.D. Cal. 2012). A minor can also enter into an employment
25 agreement. *Coughenour v. Del Taco, LLC*, 57 Cal. App. 5th 740, 745 (2020), *review*

1 *denied* (Mar. 10, 2021).

2 *C.M.D. v. Facebook, Inc.* is instructive. In *C.M.D. v. Facebook*, a putative
3 class action, the plaintiffs sued Facebook claiming that it used their identities for
4 commercial purposes without their consent because their prior agreement to
5 Facebook's Statement of Rights and Responsibilities ("SRRs"), which gave
6 Facebook such consent, was unenforceable due to the plaintiffs' minority status. The
7 court, on a Rule 12(b)(6) motion to dismiss, held that "plaintiffs' basic legal theory
8 is indeed untenable," because the minor plaintiffs had the power to enter binding
9 contracts, agreed to abide by Facebook's SRRs in order to use Facebook's services,
10 and never sought to disaffirm their agreement. *Id.* at 3-4.

11 The exact same fact pattern exists here. Plaintiff's teenage son, under either
12 Texas or California law, had the power to enter into binding contracts; agreed to
13 receive messages from Defendants; and never sought to rescind his consent.
14 Therefore, every text message sent to the Number was sent with express consent,
15 and Plaintiff's TCPA claim fails as a matter of law.

16 **B. The Number is Not a Residential Number**

17 Plaintiff's TCPA claim also fails because 47 U.S.C. § 227(c)(5) only applies
18 to residential telephone numbers. *Barton v. Temescal Wellness, LLC*, 525 F. Supp.
19 3d 195, 201 (D. Mass. 2021) ("Under the TCPA, only residential phone subscribers
20 are entitled to Do Not Call protections.").

21 Here, the FAC alleges that the Number was a cell phone number (FAC ¶¶ 25,
22 27) and therefore cannot be the basis for a claim under 47 U.S.C. § 227(c)(5) claim.
23 In an effort to obtain Do Not Call protections, however, Plaintiff alleges that the cell
24 phone at issue was "primarily used for residential purposes" (FAC ¶ 27). This
25 allegation is contradicted by Plaintiff's earlier admission that she gave her son the

1 cell phone for the purpose of maintaining contact with her and her son's father.
2 Susman Decl. ¶ 8 Ex. B, p.2 ("She gave him a cell phone for E*** to stay in contact
3 with her and his father only."). Because the Number was a cell phone used by
4 Plaintiff's son primarily to stay in contact with his parents, and was not a residential
5 line, Plaintiff's TCPA claim fails as a matter of law.

6 **VI. THE FAC DOES NOT STATE A CLAIM FOR VIOLATIONS OF**
7 **TEXAS BUSINESS AND COMMERCE CODE SEC. 302.101**

8 TBCC § 302.101's "underlying purpose [is] to protect persons against false,
9 misleading, or deceptive practices in the telephone solicitation business." TBCC §
10 302.003. The statute prohibits "telephone call[s] a seller or salesperson initiates to
11 induce a person to purchase, rent, claim, or receive an item" unless the seller holds a
12 registration certificate for the business location from which the telephone
13 solicitation is made or is an established business that qualifies for an exemption. *Id.*
14 § 302.001. There are numerous exemptions to the statute, including (1) an
15 exemption for sellers of consumer goods who, for at least two years, have operated a
16 retail establishment where consumer goods are displayed and offered for sale
17 continuously, and the majority of the seller's business involves buyers obtaining
18 services or products at the retail establishment (*Id.* § 302.059), and (2) sellers who
19 solicit business from former or current customers (*Id.* § 302.58).

20 Plaintiff's TBCC claim fails for three independent reasons.

21 As an initial matter, the Texas statute applies to telephone calls, not text
22 messages. TBCC § 301.001 defines "Consumer telephone call" as "an unsolicited
23 **call** made to a residential telephone number by a telephone solicitor." And TBCC §
24 302.001(7) defines "Telephone solicitation" as "**a telephone call** a seller or
25 salesperson initiates to induce a person to purchase, rent, claim, or receive an item."

1 The plain language of the statute makes no reference to “text messages.” *Hunt v.*
2 *Superior Ct.*, 21 Cal. 4th 984 (1999) (“Our role in construing a statute is to ascertain
3 the Legislature’s intent so as to effectuate the purpose of the law. . . . If there is no
4 ambiguity in the language, we presume the Legislature meant what it said, and the
5 plain meaning of the statute governs.”).² For this reason alone, Plaintiff’s claim for
6 violation of the Texas statute fails as a matter of law.

7 Second, the Texas statute “does not apply to a consumer telephone call made
8 in response to the express request of the consumer.” TBCC § 301.051. Because
9 Plaintiff’s son expressly requested to receive text messages from Defendants,
10 Plaintiff’s claim fails as a matter of law.

11 Third, even if a text message qualified as a telephone solicitation, Defendants
12 fall within one of the exemptions to the statute as they have operated an online retail
13 establishment since at least January 1, 2016—more than two years before the first
14 text message was purportedly sent to the Number. Susman Decl. ¶ 9, Ex. C. In
15 fact, the text messages sent to the Number contained links to Defendants’ online
16 retail establishment because purchases could only be made through the website.
17 (FAC, Ex. A.).

18 For all these reasons, Plaintiff’s claim under the Texas statute fails as a matter
19 of law.

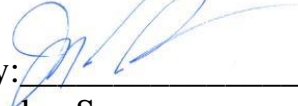
22 ² Although the Texas statute should be “liberally construed,” such liberality should
23 only be applied to promote the statute’s “underlying purpose to protect persons
24 against false, misleading, or deceptive practices in the telephone solicitation
25 business.” TBCC § 302.003. Because the FAC does not allege any “false,
26 misleading, or deceptive practices,” it would be improper to expand the statute to
include text messages.

VII. CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion to Dismiss with prejudice.

Dated: April 14, 2022

NOLAN HEIMANN LLP

By: 

Jordan Susman
Attorneys for Defendants
Smosh Dot Com, Inc. d/b/a Smosh,
and Mythical Entertainment, LLC